No. 15,334

IN THE

United States Court of Appeals

For the Ninth Circuit

LUCKY LAGER BREWING COMPANY,
a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING.

RUSSEL SHEARER,
One Montgomery Street, San Francisco 4, California,
ARTHUR H. KENT,
VALENTINE BROOKES,
1720 Mills Tower, San Francisco 4, California,
Counsel for Petitioner.

C. J. GOODELL,
San Francisco, California,
ROBERT H. HEEB,
One Montgomery Street, San Francisco 4, California,
Of Counsel.

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To the Honorable Court of Appeals for the Ninth Circuit and to the Judges thereof:

Lucky Lager Brewing Company, a corporation, petitioner herein, respectfully petitions this Honorable Court and the Judges thereof for:

(1) a rehearing in bank of the appeal from the decision and order of The Tax Court of the United States entered on July 23, 1956;

OR IN THE ALTERNATIVE

(2) a rehearing before the Honorable Judges of the Court of Appeals for the Ninth Circuit who, on June 24, 1957, rendered the decision and judgment on the appeal herein, affirming the said decision and order of The Tax Court.

The petition is based upon the following grounds:

THE FACTS OF THE CASE.

We concede that if the state and federal excise taxes on beer which petitioner paid and thereafter collected are includible in the language which Congress used to define that portion of a taxpayer's receipts which result from sales of merchandise, petitioner cannot use that excess profits tax measure of its normal income permitted to "growth" corporations.

The evidence uncontradictedly shows:

That during the base period a federal tax of $8 a barrel and state taxes in varying amounts were paid and thereafter collected by petitioner.

That the taxes were not separately stated in petitioner's invoices except that when a tax was *not* included, then the invoice referred to its exclusion.

That the taxpayer did not segregate the amounts of taxes collected, as such, either in its reports to shareholders or in its income tax returns.

That this taxpayer could have, with equal propriety, done the opposite in all of these things, namely: billed the tax separately and excluded the tax from the receipts both in its reports to shareholders and its income tax returns.

In brief, if one included it in receipts one would add a like amount to disbursements; if one excluded it from receipts one would exclude it from disbursements.

The evidence also showed not only that this taxpayer could have done the opposite, but that a large number and virtually all of large classes of other taxpayers did it the other way. It is further undisputed that at the time this

taxpayer chose this course of accounting it was proper and made no difference in any respect whatever to the taxpayer or to anyone else; that it in no way changed its tax situation or its taxable income, or taxes which it paid.

The Federal tax itself, by the terms of the statute, was imposed upon beer manufactured and sold (1939 Internal Revenue Code, Section 3150), and the same Federal Tax statute provided for a refund of the tax if the beer was not sold because it was lost or became unsaleable. (Id. Section 3154).

The opinion of the Chief Judge states the entire statute defining the term "gross receipts". It also states the question involved in this case, to wit: the construction of the language of the first subsection, (A), of that definition.

In construing a statute it frequently happens that an examination of the results that follow each of the possible constructions will be helpful in choosing the proper construction. For that reason we will briefly state, in terms of facts, the consequences which necessarily follow each of the two possible decisions of this Court.

THE RESULTS WHICH FOLLOW FROM EACH OF THE TWO POSSIBLE DECISIONS.

The question before this Court can be decided either way without making the least bit of difference to any taxpayer except those taxpayers upon whom excise taxes are levied in a dollar amount per unit of property, such as those on gallons of gasoline, barrels of beer, numbers of cigarettes, pounds of tobacco, etc.

The decision, of course, has no effect upon taxpayers who do not have excise taxes levied upon the merchandise which they sell or the services which they render.

Where the excise tax is levied in terms of a percentage of the sales price the decision of this Court either way on this question does not affect them because, when these taxpayers raise their prices, they, by their own act, raise the amount of the excise tax paid and collected by the same amount.

There is one situation in which excise taxpayers of both classes are affected. This situation is adverted to in the concurring opinion;—Where there is an original imposition of either type of excise tax or the increase of either type of excise tax, or the decrease of either type of excise tax.

In such cases the gross receipts, if they include the tax, will be affected favorably to taxpayer where a new tax is imposed or an existing tax is increased more than the selling price (or without an increase in the selling price), and adversely to taxpayer where the tax is increased less than the selling price, or decreased.

Otherwise, the only effect of this decision, one way or another, is to grant or deny to the class of taxpayers to which petitioner belongs the results which are applicable to all other taxpayers.

Under the present decision of this Court all classes of taxpayers, except the one to which petitioner belongs, would, if they had had the same growth as petitioner, have been entitled to use the growth formula.

If this Court should have decided the question the other way, it would not have changed the results as to these other taxpayers one particle, but it would have resulted in the class to which petitioner belongs reaching the required 150% upon the same amount of growth as the other taxpayers and would also have eliminated the possibility of any taxpayer of petitioner's class achieving that status solely by reason of the imposition of a new tax or a substantial increase of an existing tax.

GROUNDS OF THE PETITION.

The Court misinterpreted the arguments of petitioner and attributed to petitioner arguments which it did not make.

Its opinion is based on three fallacious lines of reasoning:

1. The Court adopted a construction of the language of subdivision (A) of Section 435(e) (5) which results in an obviously impossible meaning.

2. The Court appears to have believed that the choice by petitioner of a method of invoicing and accounting controlled its right to a subsequently enacted statutory privilege.

3. The Court, in support of its opinion, cites a case which deals with a question not here involved but which assumes as a fact the very thing we are trying to establish.

The concurring opinion recognizes that the result is unjust and that under this decision some taxpayers might be

unjustly enriched; we respectfully submit that the author of that opinion should reconsider it in the light of the fact that the only result of the opposite holding would be to eliminate this injustice as well as the possibility of the unjust enrichment.

Attributing to the word "total" the interpretation in the opinion of the Chief Judge, let us examine the meaning of the subsection.

The main opinion in effect states that the word "total" should be read as characterizing the receipts from each of the three kinds of property mentioned in subsection (A), to wit:

> The total amount received from stock in trade;
>
> The total amount received from property properly included in taxpayer's inventory;
>
> The total amount received from the sale of property primarily held for sale.

If this is so the section then would read, in skeleton outline, as follows:

(A) The total amount received or accrued during such period from the sale, exchange or other disposition of stock in trade of the taxpayer

OR

The total amount received or accrued during such period from the sale, exchange or other disposition of property of a kind which would be properly included in the inventory of the taxpayer

OR

The total amount received or accrued during such period from the sale, exchange or other

disposition of property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business.

AND

(B) The "Gross Income" from taxpayer's other business activities.

Congress' use of the disjunctive, we submit, completely disposes of this view of the meaning to be attributed to the word "total" in this subsection.

It clearly demonstrates that, as we have said, the word "total" is necessary only because the disjunctive was used and by its use Congress achieved the same effect which it would have achieved if it had used the conjunctive and omitted the word "total".

To use a construction of the word "total" which requires a choice of one of the three kinds of receipts from property, we respectfully submit, renders the result totally impossible.

This interpretation resulted, we think, from the Court substituting its independent concept of the meaning of the term "gross receipts" for the Congressional definition in the body of one subsection.

It should be pointed out here that the term "gross receipts" is one which is collectively used to describe the result of adding receipts from the sales detailed in subsection (A) to the gross income of taxpayer described in subsection (B). A title which describes two things cannot and should not be substituted for the expressed definition of one of those things.

Paragraph (5) of Section 435(e) defines "gross receipts" as the sum of the items set forth in subsection (A), specifying them disjunctively ("or" being used 5 times), and then connects (A) with (B) by the use of the conjunctive "and". We contend that paragraph (5) itself —and the sequence and collocation of its words—demonstrates that the sense in which the lawmakers used the phrase "The total amount received or accrued" was for the purpose of *adding together (i.e. totalling) the several and distinct items.* When the Court speaks of "the *total* amount received or accrued . . . from the sale . . . of stock in trade", with its own emphasis on the word *"total",* and in the next sentence criticizes our contention as illogical, it is clear that the word "total" was erroneously treated in the sense of *the over-all amount received UPON the sale, including the excise tax.*

Erroneously, we think, the court has inserted in the language of subsection (A) the equivalent of the phrase "including excise taxes, if any", and has isolated the word "total" and the phrase "stock in trade" from the other language of the subsection.

Congress has characterized language identical to that of subsection (A) by the title "net sales". The Commissioner used the term "net sales" to describe petitioner's argument.

In another subdivision of this same Section 435(e) Congress has defined "net sales" in the following language:

> "(iii) the amount of the taxpayer's net sales which is attributable to such product or class of similar products, for the calendar year 1946 is 5 per centum or less of the amount of its net sales so at-

> tributable for the calendar year 1949. *For the purposes of this subparagraph, the term 'net sales' with respect to any period means the total amount received or accrued during such period from the sale, exchange, or other disposition of stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business;* reduced by the amount of discounts, returns, and allowances paid or incurred for such period." (Section 435(e) (1) (B) (iii).) (Italics ours.)

The only difference in the language is the addition of a provision excluding returns, discounts and allowances which, by their very nature, would not be included in receipts. Such receipts would be reduced by those amounts either on the invoice to which applicable or as a credit on future invoices.

Where, therefore, there is any characterization by Congress of the language with which we are concerned, that characterization is the term "net sales".

The Commissioner concedes that if this is the correct characterization of the language we are right.

On page 16 of his brief, referring to the taxpayer's argument, he says:

> "But that would be to make eligibility for use of the growth formula depend upon *net* sales or *net profit,* whereas the test provided by Congress is with respect to '*gross* receipts' (italics supplied), defined as including the 'total' amount received or accrued from the sale of stock in trade."

The term "net sales", which admittedly does not include excise taxes, is obviously a more accurate measure of petitioner's "increase in physical volume of production" which Congress stated to be the index for the growth formula (81st Congress, Second Session: Senate Report No. 2679, p. 27; House Report No. 3142, p. 24). The exclusion of reimbursements for such taxes eliminates a factor which in no way measures "physical volume of production" and accords with this legislative intent.

This Court seems to have indicated that petitioner's bookkeeping methods during a period prior to the enactment of the Excess Profits Tax Act of 1950 are persuasive as to the meaning of subsection (A) of Section 435(e)(5) (Opinion, p. 4, footnote 2). Such a holding leads inevitably to the untenable conclusion that the tax laws are to be interpreted differently for various taxpayers, depending upon the manner in which their books of account are kept.

The main opinion (p. 4 in Footnote 2) comments on the fact that the tax was not separately stated in petitioner's income tax returns or its reports to its stockholders, without noting that it would have been permissible for petitioner to have done the opposite, and without noting that other taxpayers did the opposite.

Seemingly the Court attached some significance to this fact, feeling possibly that petitioner should not now be heard to say that the amount of the tax was an amount separate and apart from the amount which it received for its beer.

Let us examine the results of such a rule. If this fact is persuasive, then a competitor of petitioner who had kept its books the other way would get the other treatment by this Court upon the same state of facts.

The facts are that a choice between accounting methods was made years or decades before the enactment of the statute. Which method was chosen at that time had no significance to anyone other than petitioner. To hold that only if petitioner chose one of those two methods is it entitled to a privilege subsequently enacted by Congress is, we feel, obviously erroneous. Congress cannot have intended that the measure of growth should be one thing for one taxpayer and another thing for another taxpayer, depending upon which choice of bookkeeping methods they had made years or decades before.

To say that accounting methods make a difference here is, in effect, to say that the same thing wasn't sold for the same price where in one case it was sold for "$20 plus tax" and in the other case it was sold for "$28" (where the tax was $8 in each instance).

The reliance by this Court on the Liggett & Myers case has resulted in the erroneous application of a rule of purely constitutional law to a question of statutory construction. If at all material to the case at bar, the Liggett & Myers decision clearly recognizes the separate and identifiable existence of an excise tax from the price received for merchandise.

The only case cited in support of the decision is *Liggett & Myers Tobacco Co. v. United States,* 299 U.S. 383, 81 L.ed. 294. That case is similar to this in two respects. (1st) both cases involve an excise tax on a unit basis (18 cents a pound on tobacco in one; $8 a barrel on beer in the other) and (2) in Liggett the tax was on a commodity (tobacco) "hereafter *sold* by the manufacturer or importer, or removed for consumption or *sale*" and here the tax was on a commodity (beer) "manufactured *and sold,* or removed for consumption *or sale*" (emphasis

added)—both statutes conjoining "sale" with "manfacture". But there the similarity ends.

The question presented for decision was purely a constitutional question on which the Supreme Court held that the effect of the tax upon the purchaser was indirect and imposed no prohibited burden on the State of Massachusetts under the rule of *Cornell v. Coyne,* and *Wheeler Lumber, Bridge & Supply Co. v. United States.*

The *Cornell case,* 192 U.S. 418, 48 L.ed. 504, and the *Wheeler case,* 281 U.S. 572, 74 L.ed. 1047, both presented constitutional questions and none of the three presented any such problem of statutory construction as that presented herein.

The precise question before the Supreme Court in the *Liggett & Myers case* was whether the Massachusetts Hospital should pay $13.34 for its tobacco or $13.34 plus $17.28 tax on the 96 pounds, making a total of $30.62. Specifically, it was a suit for a refund of the $17.28 which had been païd for taxes.

In all of these cases the amount of money involved is the money paid for the tax. In none of these cases is the money paid for the merchandise involved.

To put it another way, all of these cases prove, by assuming as a fact, that the amount of money paid for the tax is a separate and identifiable thing. They further assume that by subtracting the exact amount of the tax one arrives at the price of the merchandise.

The concurring opinion concedes the injustice resulting from the decision of the Court. It also notes the danger of unmerited relief. But it does not note that the opposite decision would remove both injustices and would not change the results as to any taxpayer except those to which the decision is unfair and those who might gain undeservedly.

The concurring opinion concedes that the interpretation of the subsection by this Court results in an unfair and un-uniform application of the statute. Furthermore, it states a concern on account of its unfairness to Lucky Lager.

If the thought of the concurring opinion were pursued beyond the facts affecting this single taxpayer, it would be found that this interpretation is unfair to all taxpayers who are similarly situated with Lucky Lager, to wit:

Manufacturers of tobacco, matches, cigarettes, tires, tubes, gasoline and playing cards, as well as beer.

The opinion, however, justifies the concurrence in this unfairness without examining the consequences of an opposite holding.

We respectfully submit that our arguments addressed to the fallacy of the main opinion are immeasurably strengthened by a consideration of these consequences.

And, as we have said, this interpretation is not unfair—because it makes no difference—as to the many excise taxes which are stated in terms of a percentage of the selling price, such as automobiles and light bulbs, because the taxpayer can and does raise his own excise taxes by raising his prices.

It is not unfair to taxpayers who have no excise taxes involved, because when they raise their prices there is no distorting factor in their receipts.

The concurring opinion suggests that if the amount of the excise tax had been raised the opposite kind of injustice might present itself, but concludes that the court would have voted in favor of that injustice. The opposite conclusion to the present one would not have changed the results as to any taxpayer who is not subjected to this unfairness and would put those taxpayers who are subjected to this unfairness in exactly the same position as those who aren't.

CONCLUSION.

We respectfully submit, in endeavoring to summarize the errors of this decision, that the Court has rendered meaningless Congress' attempt to limit the receipts to those which had reference to physical volume of production. This was done, we feel, through disregarding the fact that Congress was at pains to limit subsection (A) to those receipts which would measure the volume of merchandise sold by a taxpayer in the ordinary course of its business.

In conclusion, we respectfully submit that if the Court looks for the meaning of subsection (A) in the statute itself and, if necessary, the titles which Congress has attributed to that language in companion statutes and to the language of the legislative history expressing the Congressional intent, and thereafter views the question

in the light of the alternative consequences, it should grant a rehearing in the case at bar.

Dated, San Francisco, California,
July 23, 1957.

Respectfully submitted,
Russel Shearer,
Arthur H. Kent,
Valentine Brookes,
Counsel for Petitioner.

C. J. Goodell,
Robert H. Heeb,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
July 23, 1957.

C. J. GOODELL,
Of Counsel for Petitioner.